UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 88

Docket No. DC-1221-11-0860-W-1

Barry A. Ormond,

Appellant,

v.

Department of Justice,

Agency.

July 18, 2012

Barry A. Ormond, Washington, D.C., pro se.

John T. LeMaster, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we VACATE the initial decision, FIND that the appellant established jurisdiction over some of his allegations, and REMAND this appeal to the Washington Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a Staffing Specialist with the agency's Bureau of Prisons. Initial Appeal File (IAF), Tab 1 at 1. On August 10, 2011, he filed an IRA appeal, asserting that the agency declined to select him for an Assistant Human Resources Management position in retaliation for his protected whistleblowing. *Id.* at 4, 7. He asserted that he made disclosures about a prohibited personnel practice concerning an illegal hiring preference and about three employees who falsely stated that they attended mandatory training. *Id.* at 7. The administrative judge issued an order to show cause informing the appellant of the requirements for establishing jurisdiction over his IRA appeal. IAF, Tab 3. After receiving the responses of the appellant and the agency, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tabs 7, 9, 10. He found that the appellant exhausted his administrative remedy with the Office of Special Counsel (OSC) with respect to the nonselection. IAF, Tab 10, Initial Decision (ID) at 6. He further found that the appellant failed to make a nonfrivolous allegation that he made a protected disclosure under 5 U.S.C. § 2302(b)(8) or that such a disclosure was a contributing factor in his nonselection. ID at 6-7.

¶3 The appellant has filed a petition for review, asserting that he was not able to produce evidence in support of his claim without conducting discovery. Petition for Review (PFR) File, Tab 1 at 4-5. He asserts that the administrative judge abused his discretion by not compelling discovery concerning the prohibited personnel practice investigative file, and he asks the Board to reopen the appeal. *Id.* at 42. The agency has opposed the petition for review. PFR File, Tab 3.

ANALYSIS

¶4 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a

protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). To meet the nonfrivolous standard, an appellant need only plead allegations of fact that, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 18 (2010). Any doubt or ambiguity as to whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 10 (2010). If the appellant establishes Board jurisdiction over his IRA appeal by exhausting his remedies before OSC and making the requisite nonfrivolous allegations, he has the right to a hearing on the merits of his claim. *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 7 (2011).

The appellant demonstrated that he exhausted his administrative remedies before OSC.

¶5 An employee seeking corrective action for whistleblower reprisal under 5 U.S.C. § 1221 is required to seek corrective action from OSC before seeking corrective action from the Board. 5 U.S.C. § 1214(a)(3); *see Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 8 (2010). The Board may only consider those disclosures of information and personnel actions that the appellant raised before OSC. *See Baldwin*, 113 M.S.P.R. 469, ¶ 8. To satisfy the exhaustion requirement, the appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 13 (2009).

¶6 As the administrative judge correctly found, the appellant demonstrated that he exhausted his administrative remedies before OSC. IAF, Tab 1 at 12-14, Tab 7 at 11-59. The appellant informed OSC of his disclosure to Ike Eichenlaub, the Regional Director, that a Human Resources Manager had unlawfully granted

preference to an applicant for a position in violation of merit system principles, and he informed OSC that he made other disclosures to Mr. Eichenlaub regarding violations of policies and procedures, falsification of documents, and violations of regulations. IAF, Tab 7 at 27, 29-30, 53. He also informed OSC of his belief that Mr. Eichenlaub retaliated against him by declining to select him for an Assistant Human Resources Manager position in February 2011. *Id.* at 30, 54-55. He alleged that Mr. Eichenlaub, who was the selecting official for the promotion, took this personnel action against him merely 6 months after his disclosures. *Id.* at 37. Thus, the appellant demonstrated that he exhausted his administrative remedies with OSC on these issues.

The appellant made a nonfrivolous allegation of a protected disclosure.

¶7 Protected whistleblowing occurs when an appellant makes a disclosure that he reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8); *Mason*, 116 M.S.P.R. 135, ¶ 17; 5 C.F.R. § 1209.4(b). At the jurisdictional stage, the appellant is only burdened with nonfrivolously alleging that he reasonably believed that his disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8). *Mason*, 116 M.S.P.R. 135, ¶ 17. The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Id.*

¶8 In his initial appeal, the appellant alleged that he reported to Mr. Eichenlaub a prohibited personnel practice concerning an improper hiring preference and selection and that he reported to Mr. Eichenlaub misconduct by three employees who improperly certified that they attended a mandatory training when, in fact, they did not attend the training. IAF, Tab 1 at 6-7, Tab 7 at 5-6.

Although it appears that the appellant made other disclosures to OSC, he did not identify or include them in his submissions to the Board, and we do not consider them further. IAF, Tab 7 at 29-30.

¶9 The appellant's assertions concerning his belief that he disclosed a prohibited personnel practice to Mr. Eichenlaub are somewhat lacking in specificity and detail. *Id.* at 4-10. When read in conjunction with the OSC correspondence attached to his submissions, however, we find that he made a nonfrivolous allegation of a protected disclosure. In his complaint to OSC, he asserted that the agency violated 5 U.S.C. § 2302(b)(6)[1] when management officials and human resources personnel gave an applicant an unfair advantage during the application process for a Press Foreman position, which resulted in both a disadvantage to the other two applicants on the certificate and an improper promotion to the favored applicant. *Id.* at 14, 16. Specifically, the appellant alleged that he was involved in processing applications for the Press Foreman position and preparing the certificate of eligibles. *Id.* at 14. He witnessed a conversation between the Plant Manager and the Human Resources Manager in which the Plant Manager expressed that a particular applicant on the certificate should be selected. *Id.* at 14, 27, 32. Thereafter, the Human Resources Manager selected only that individual for an interview, and that individual was selected for the position. *Id.* The appellant alleged that the names of the other two individuals on the certificate were forwarded to the selecting official without being interviewed and that they had no chance of being selected. *Id.* at 14, 32. He alleged that when he informed the Human Resources Manager that her actions violated merit promotion principles, he was "pulled off the certificate and it was processed by someone else." *Id.* at 21, 33-34. The appellant asserted that, after

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[1] 5 U.S.C. § 2302(b)(6) prohibits an employee from "grant[ing] any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment . . . for the purpose of improving or injuring the prospects of any particular person for employment."

reading an article concerning prohibited personnel practices and illegal preference during the hiring process, the appellant believed that the events at issue amounted to a prohibited personnel practice and he reported them to Mr. Eichenlaub. *Id.* at 21, 27, 41-43, 53.

¶10 We find that the appellant has nonfrivolously alleged that he reasonably believed he was disclosing a violation of law, rule, or regulation when he disclosed alleged hiring improprieties to Mr. Eichenlaub. *See* 5 U.S.C. § 2302(b)(6), (12); *McDonnell v. Department of Agriculture*, 108 M.S.P.R. 443, ¶¶ 10-13 (2008) (finding that the appellant made a nonfrivolous allegation that she made a protected disclosure because the alleged disclosure concerned hiring and selection improprieties that could constitute violations of 5 U.S.C. § 2302(b)(6) and (b)(12)); *Schaeffer v. Department of the Navy*, 86 M.S.P.R. 606, ¶¶ 9-10 (2000) (finding that the appellant made a nonfrivolous allegation that he disclosed a violation of law and an abuse of authority regarding improper personnel selections), *overruled on other grounds by Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 9 n.2 (2010). A disinterested observer with knowledge of the essential facts known to the appellant could reasonably conclude that the agency granted a preference to the favored applicant, in violation of law, rule, or regulation. Thus, we find that the appellant made a nonfrivolous allegation of a protected disclosure.

¶11 The appellant also alleged that he reported to Mr. Eichenlaub that three Human Resources employees "had been involved in misconduct related to attending training they did not attend." IAF, Tab 7 at 6, 30, 54. He alleged that the training was mandatory for all staff in the federal prison system and that the failure to be properly trained was gross mismanagement that could adversely impact the agency's mission. *Id.* at 6. Aside from these bare allegations, however, he provided no further information regarding the training, the consequences of not attending the training, or the alleged falsification of documents. *Id.* Furthermore, he did not nonfrivolously allege that this conduct

evinced gross mismanagement. *See Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 16 (2007) (gross mismanagement is an "action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission;" "[i]t must be more than de minimus wrongdoing or negligence, and does not include management decisions that are merely debatable"). Consequently, we find that this bare allegation, in the absence of any specific information, does not constitute a nonfrivolous allegation of a protected disclosure.[2]

The appellant made a nonfrivolous allegation that his alleged protected disclosure was a contributing factor in his nonselection.

¶12 To satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Mason*, 116 M.S.P.R. 135, ¶ 26. One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Mason*, 116 M.S.P.R. 135, ¶ 26; *see* 5 U.S.C. § 1221(e)(1). Once the appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, he has met his jurisdictional burden with regard to the contributing factor criterion. *Mason*, 116 M.S.P.R. 135, ¶ 26.

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[2] Further, the appellant provided no information regarding when he complained to Mr. Eichenlaub regarding this misconduct; he only stated that the training was the "Annual Refresher Training 2010." IAF, Tab 7 at 6. It is also unclear whether Mr. Eichenlaub knew that the appellant made this disclosure because it appears that he made it anonymously. *Id.* at 54. Thus, even had the appellant articulated a nonfrivolous allegation of a protected disclosure, he did not make a nonfrivolous allegation that it was a contributing factor in the personnel action.

¶13 A failure to appoint or promote is a "personnel action" within the meaning of the Whistleblower Protection Act. 5 U.S.C. § 2302(a)(2)(A)(i), (ii). The appellant alleged that he made the disclosure regarding the prohibited personnel practice to Mr. Eichenlaub in or around August 2010. IAF, Tab 1 at 7, Tab 7 at 9. Thereafter, in November or December 2010, he applied for the Assistant Human Resources Manager position, for which Mr. Eichenlaub was the selecting official. IAF, Tab 7 at 9. The appellant was not selected for the promotion and was informed in February 2011 that the agency selected another individual, who was allegedly less qualified and under investigation for falsifying her attendance at the mandatory training. IAF, Tab 1 at 7, 15. Given the 6-month timeframe between the disclosure to Mr. Eichenlaub and Mr. Eichenlaub's decision not to select the appellant, we find that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Wadhwa v. Department of Veterans Affairs*, 110 M.S.P.R. 615, ¶ 13, *aff'd*, 353 F. App'x 435 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 2084 (2010). Consequently, we find that the appellant has nonfrivolously alleged that his prohibited personnel practice disclosure is protected and was a contributing factor in his nonselection, and he is entitled to a hearing on the merits of these allegations.

ORDER

¶14 Based on the foregoing, we conclude that the Board has jurisdiction over the appellant's allegations that his prohibited personnel practice disclosure was a contributing factor in his nonselection, and we REMAND the appeal to the Washington Regional Office for further adjudication and a hearing on the merits

of these allegations consistent with this Opinion and Order. *See Johnson*, 104 M.S.P.R. 624, ¶ 32.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.